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No. 97-0404 (2)

In the Supreme Court of the United States
October Term, 1997

CYNTHIA J. FISHER,

PETITIONER,

v.

VASSAR COLLEGE.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, THE AAUW LEGAL ADVOCACY FUND, THE EMPLOYMENT LAW CENTER, EQUAL RIGHTS ADVOCATES, THE NATIONAL WOMEN'S STUDIES ASSOCIATION, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, THE NOW LEGAL DEFENSE AND EDUCATION FUND, AND THE WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether the decision below conflicts with this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), by requiring a plaintiff in a Title VII action to adduce evidence of intentional discrimination beyond that deemed sufficient as a matter of law by this Court to sustain a verdict of discrimination.

2. Whether this Court should resolve a conflict among the circuit courts of appeals in interpreting *Hicks* as to the proper weight to be accorded a finding of pretext in proving an employment discrimination claim.

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INTEREST OF THE *AMICI CURIAE*

Amicus the American Association of University Women (AAUW) has over 160,000 members in 50 states and is

dedicated to promoting education and equity for women and girls. *Amicus* the AAUW Legal Advocacy Fund (LAF) is a nonprofit charitable organization dedicated to supporting women seeking redress for sex discrimination in higher education. LAF has monitored this litigation for several years because of its direct bearing on the fund's mission. It has more recently provided financial assistance to petitioner in her continuing litigation against Vassar, but has no financial interest in the outcome of this litigation. The AAUW and the LAF support the petition because the court of appeals' decision is inconsistent with their commitment to fair and equitable treatment, especially for women, in all higher education.

Amicus the Employment Law Center (ELC), a project of the Legal Aid Society of San Francisco, is a private, non-profit organization dedicated to improving the working lives of disad-vantaged people. ELC represents indigent workers in cases involving employment discrimination and workplace rights, specializing in, among other areas, Title VII and the Americans with Disabilities Act. ELC has represented clients in numerous discrimination claims, including *United States v. City and Cty. of San Francisco*, 696 F. Supp. 1287 (N.D. Cal. 1988), *aff'd*, 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, 498 U.S. 897 (1990), and has appeared as *amicus curiae* in cases such as *School Bd. of Nassau Cty. V. Arline*, 481 U.S. 1024 (1987).

Amicus Equal Rights Advocates (ERA) is a public interest law firm specializing in educational and litigation efforts to eliminate gender discrimination and secure equal rights. Begun in 1974 as a teaching law firm focused on sex-based

discrimination, ERA has evolved into an organization with a multi-faceted approach to addressing women's issues. Its current work includes impact litigation, advice and counseling, public education, and public policy initiatives. Because economic independence is fundamental to women's ability to gain equality in other spheres of society, ERA has long focused on gender equality in the workplace, and has a particular interest in the judicial interpretation and implementation of Title VII.

Amicus the National Women's Studies Association (NWSA) was formed in 1977 to further the social, political, and professional development of Women's Studies throughout the country and the world at every educational level. The NWSA is committed to being a forum conducive to dialogue and collective action among women dedicated to feminist education and change. The NWSA's Academic Discrimination Task Force helps women educators and administrators who are victims of discrimination on the basis of gender, race, ideology, or sexual orientation. The Task Force maintains a legal fund which helps women defend themselves from employment discrimination in education, and maintains a letter writing network and a plaintiff-support network. The activities of the NWSA and the Task Force are dedicated to improving the status of women.

Amicus the New York Lawyers for the Public Interest, Inc. (NYLPI) is a non-profit law office that works to protect the rights of people with disabilities. Through its Disability Law Center, NYLPI seeks to protect and promote the civil rights and liberties of people with disabilities and enable them fully to participate in the mainstream of American life. NYLPI

has been extremely active on issues involving application of Title I of the Americans with Disabilities Act (ADA) to discrimination in employment, representing numerous individuals and filing *amicus curiae* briefs on its own behalf and on behalf of disability and civil rights groups in cases around the country addressing the application of the ADA. The issues presented in this case concerning the appropriate role of a finding of pretext under Title VII are also important to cases filed under Title I of the ADA, because of the potential for application of the standards developed under Title VII to Title I of the ADA.

Amicus the NOW Legal Defense and Education Fund (NOW LDEF) is a leading non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, including employment discrimination barred by Title VII of the Civil Rights Act of 1964. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of employment discrimination laws, including *Harris v. Forklift Systems*, 510 U.S. 17 (1993), *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), and *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993).

Amicus the Women's Legal Defense Fund (WLDF) was founded in 1971 as a national advocacy organization that develops and promotes public policies to help women

achieve equal opportunity, quality health care, and economic security for themselves and their families. Over its 23-year history, WLDF has placed special emphasis on equal employment opportunity by monitoring agencies' EEO enforcement, challenging sex-based discrimination in the courts, and leading efforts to promote employment policies such as the 1993 Family and Medical Leave Act and the 1978 Pregnancy Discrimination Act.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court.[1]

SUMMARY OF THE ARGUMENT

The court of appeals' decision reflects a deep misunderstanding of the law governing the proof required to establish that an employer has discriminated in violation of Title VII of the Civil Rights Act of 1964. This Court held in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), that a verdict that discrimination occurred may be supported by a finding that the employer has offered a pretextual explanation for its decision. In this case, the court of appeals affirmed as not clearly erroneous the fact-finder's conclusion that the respondent's explanation for its decision was pretextual. Under *Hicks*, that finding was sufficient to sustain the fact-finder's further conclusion that respondent discriminated

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[1] Pursuant to Supreme Court Rule 37.6, counsel certifies that this brief was authored by the *amici* and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

against the petitioner. Thus, the court of appeals' conclusion of clear error on the ultimate issue of discrimination misread *Hicks* and overstepped appellate authority to review findings of fact under Rule 52 of the Federal Rules of Civil Procedure. The decision also deepened a conflict among the courts of appeals regarding the meaning of *Hicks* and the role of pretext in proving discrimination. The petition should be granted to correct these errors, and resolve the split in the circuits.

REASONS FOR GRANTING THE PETITION

The court of appeals' interpretation of Title VII substantially recast the burden-shifting framework for employment discrimination claims established and long adhered to by this Court. Its decision conflicts with rulings of this Court regarding the amount of evidence a plaintiff must adduce to sustain a verdict of discrimination, as well as the proper scope of appellate review for clear error under Rule 52 of the Federal Rules of Civil Procedure. The decision below also deepens a conflict in the courts of appeals on the interpretation of this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). For each of these reasons, and because this case is a particularly apt vehicle for consideration of these issues, the petition should be granted.

1. In a line of decisions running from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), through *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Hicks*, this Court has carefully constructed a framework for the litigation of employment discrimination claims.

Recognizing that direct, "smoking gun" evidence of discrimination is rarely available, that framework permits a plaintiff to prove her case via inferences drawn from indirect evidence. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (noting that the "entire purpose" of the *McDonnell Douglas* framework is "to compensate for the fact that direct evidence of intentional discrimination is hard to come by").

Among the most common types of indirect evidence plaintiffs use is proof that when called upon to explain its actions, an employer has offered only reasons that are found to be pretextual. Such proof is powerful evidence of discrimination, both because it leaves the employer's actions unexplained, *see Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978) ("[W]hen all legitimate reasons have been eliminated . . . it is more likely than not that the employer . . . based his decision on an impermissible consideration such as race."), and because it undermines the employer's credibility while demonstrating its need to hide the genuine motive for its actions. Pet.App. 280a ("'Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct.'") (Newman, Ch.J., dissenting) (quoting *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995)).

This Court considered the proper place of pretext as proof of discrimination most recently in *Hicks*, holding that an inference of discrimination is not mandatory upon a finding of pretext, but that it is a permissible inference, even if the finding of pretext is (together with the elements of the *prima*

facie case) the entirety of the plaintiff's proof of discrimination. *Hicks*, 509 U.S. at 511 ("Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."). In short, under *Hicks*, a fact-finder may find discrimination based upon the plaintiff's *prima facie* case plus a finding that the employer has offered a pretextual explanation.

The court of appeals' ruling in this case is directly contrary to, and upsets the balance drawn in, *Hicks*. The panel sustained the district court's finding that respondent offered a pretextual explanation for denying petitioner tenure. Pet.App. 191a. The *en banc* court left this ruling in place. *Id.* Under *Hicks*, that should have been "enough at law to sustain a finding of discrimination." *Hicks*, 509 U.S. at 511 n.4. The court of appeals, however, held that it was *not* enough, reversing as clearly erroneous the trial court's explicit finding that the real reason was discrimination.

In reaching this conclusion, the court of appeals explained that a finding of pretext is not *always* sufficient support for a finding of discrimination. Pet.App. 198a-200a. As a result, it concluded, the decision to draw the inference of discrimination from the finding of pretext is reviewable for clear error under Rule 52. Pet.App. 203a. This unremarkable proposition, however, was utilized by the court of appeals in a fashion that mistook the exception for the rule.

As the dissent below noted, there are exceptional circumstances in which a valid finding of pretext would not necessarily provide sufficient support for a finding of discrimination. *See* Pet.App. 282a ("Obviously, if the

evidence points toward a motive other than discrimination, a pretextual explanation offers slight, if any, basis for inferring discrimination.") (Newman, Ch.J., dissenting). *See also Woods v. Friction Materials, Inc.*, 30 F.3d 255, 261 n.3 (1st Cir. 1994); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (*en banc*). For instance, a plaintiff might disprove the employer's assertion of poor performance as the basis for discharge by showing that the real reason was the manager's need to cover up her own embezzlement. Such a showing would establish both that the proffered explanation was pretextual, but also that discrimination was *not* the real reason for the discharge.

It is, however, the exceptional case in which evidence will point toward a "third reason," belying both the explanation proffered by the employer and the discrimination alleged by the plaintiff. And it is rarer still that such evidence will point so strongly toward a "third reason" that the trier of fact clearly errs in rendering a finding of discrimination. That is why this Court in *Hicks* stated the general rule that a finding of pretext is enough to sustain a finding of discrimination. Here, the court of appeals substituted the implicit exception to that rule for the rule itself, and violated the limitations imposed by Rule 52, because it failed to defer to the verdict of discrimination despite the absence of evidence in the record of a "third reason."[2]

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[2] Even if cases where the inference of discrimination cannot follow from the finding of pretext are common rather than exceptional, the "third reason" scenario as a basis for assigning "minimal" weight to the finding of pretext, Pet.App. 200a, still requires some

The lack of evidence of a "third reason" is manifest from what the court of appeals did and did not say in this respect. It is striking that the majority below did not identify any evidence pointing in the direction of a "third reason." Pet.App. 274a ("[I]n this case, there was nothing in the record to support a finding that . . . any of the majority's other hypothesized explanations were the reason for Vassar's proffer of a pretextual explanation.") (Newman, Ch.J., dissenting). Instead, the *en banc* court simply stated that "the inaccuracies in Vassar's statements are explicable by so many equally possible motivations that none emerged with any persuasive force," Pet.App. 216a, while failing to identify the evidence in the record that rendered even one of those "possible motivations" not just "possible" but plausible as an alternative to petitioner's allegation of discrimination. Pet.App. 283a ("Evidence, not speculation about possibilities, will normally be the soundest basis for diminishing or even eliminating the probative force of a finding of pretext.") (Newman, Ch.J., dissenting). There are *always* "possible" explanations other than discrimination for why an employer has proffered a pretextual explanation. Thus, if the presence of such "possible" alternatives unsupported by actual evidence renders a finding of pretext insufficient, then pretext will never be sufficient -- a result

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evidence identifying and pointing to that reason. *See Burdine*, 450 U.S. at 255 n.9 ("An articulation not admitted into evidence will not suffice."). Of more direct relevance, finding clear error in a decision to infer discriminatory intent from pretext requires not just some evidence of a "third reason," but evidence sufficient to make the inference implausible. *See infra* pp. 13-14.

directly contrary to *Hicks*.[3]

Even if the court of appeals did not mean to render pretext legally insufficient as proof of discrimination in every case, it is perhaps the most disturbing feature of the decision below that it provided no guidance on how pretext findings are to be evaluated. So far as appears, it is an ad hoc process by which each appellate panel will simply use "common sense" to decide whether a particular finding of pretext "points nowhere," Pet.App. 32a, without apparent regard for the fact-finder's belief that it pointed in the direction of discrimination. By vesting appellate panels with unlimited discretion to judge the weight to be accorded a finding of pretext, the court of appeals eviscerated Rule 52's limitations on review of factual findings.

The decision below leaves plaintiffs in the position of having to adduce some direct evidence of discrimination, instead of or in addition to evidence of pretext. Nothing else

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[3] In *Hicks*, this Court observed that it is not too much to expect plaintiffs to respond to explanations for the employer's decision that are "lurking in the record," since it is by introducing evidence into the record rather than some formalistic pleading that the employer "articulates" its explanation, triggering the plaintiff's burden at the third stage of the *McDonnell Douglas* framework. *Hicks*, 509 U.S. at 522-23. Surely, however, it is too much to expect plaintiffs preemptively to respond to all "possible" explanations, up to and including even those not supported by evidence in the record -- especially since allowing fact-finders and appellate courts to rely on unsupported speculation allows them "to act on their unfounded and inaccurate assumptions about discrimination." Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 Conn. L. Rev. 997, 998 (1994).

would point the fact-finder strongly enough in the direction of discrimination and away from the myriad alternative "possibilities" to insulate even a favorable verdict from appellate reversal. This defeats one of the central purposes of the *McDonnell Douglas* burden-shifting framework, which is to relieve plaintiffs of the Herculean burden of producing a "smoking gun" showing the employer's discriminatory animus.

Indeed, the court of appeals' reliance on speculative "possibilities" unsupported by evidence goes beyond even the prediction of Justice Souter's dissent in *Hicks*, which argued that the Court's opinion would compel plaintiffs to respond to "any conceivable explanation for the employer's actions *that might be suggested by the evidence*." *Hicks*, 509 U.S. at 537 (emphasis added). Under the decision below, even responding to every shadowy possibility suggested by the evidence will not suffice, for there will lurk yet other "possibilities" that *might* have motivated the employer. Only the plaintiff's presentation of some affirmative evidence that points the fact-finder explicitly in the direction of discrimination as *the* explanation will suffice; that is, only direct evidence will do.[4]

The proper rule under *Hicks*, *amici* submit, is that, absent

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[4] Beyond placing an unprecedented burden on plaintiffs, this standard renders the entire burden-shifting framework meaningless, since a plaintiff who has direct evidence to present need not rely on the *McDonnell Douglas* framework in the first place. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985); *Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

unusual circumstances, a *prima facie* case and a finding of pretext provides the support necessary to insulate a verdict of discrimination from reversal under Rule 52.[5] *See Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (*en banc*) (where evidence is sufficient to prove pretext, and jury has found discrimination, court considering motion for judgment as a matter of law "may not pretermit the jury's ability to draw . . . the inference of intentional discrimination"), *cert. denied*, 65 U.S.L.W. 3862 (1997). *Hicks* constitutes a sort of scale, telling the courts of appeals that in their conduct of clear error review, pretext is sufficiently weighty to sustain a verdict of discrimination

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[5] In explaining its view of pretext, the court of appeals said:

> Generally speaking, the stronger the evidence [apart from pretext] that illegal discrimination is present, the greater the likelihood that discrimination is what the employer's false statement is seeking to conceal. And, conversely, the weaker the evidence of discrimination, the less reason there is to believe that the employer's false statement concealed discrimination, as opposed to the numerous other reasons for which employers so frequently give false reasons for employment decisions.

Pet.App. 219a-220a. Under this rubric, a plaintiff with convincing evidence that the employer lied, but with little other evidence of discrimination, will have provided the fact-finder with an insufficient basis to find that discrimination occurred. Rather than being a principal method by which discrimination is shown, pretext will become a mere appendage to the presence or absence of direct evidence. The absence of evidence other than pretext might well lead the fact-finder to refuse to draw the inference of discrimination permitted by *Hicks*, but it does not undermine the inference where, as here, the fact-finder does draw it.

unless the evidentiary record points so strongly in a specific different direction that the court of appeals is "left with the 'definite and firm conviction'" that discrimination could not have been the true reason. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). If, conversely, discrimination *could* plausibly have been the reason, a finding of pretext is sufficient for the fact-finder to conclude that it *was* the reason. The court of appeals exceeds its authority, and renders the "clear error" standard meaningless, if it reverses such a conclusion. *See Anderson v. Bessemer City*, 470 U.S. 564, 576-77 (if reviewing court "cannot say that either interpretation of the facts is illogical or implausible," then it should not find the fact-finder's choice to be clearly erroneous).

In expanding the scope of clear error review, the court of appeals majority, not surprisingly, contended that the dissenters' position would nullify Rule 52. Pet.App. 210a-211a. This fear was unfounded. There is no dispute that clear error review is appropriate in discrimination cases litigated under the *McDonnell Douglas* framework. Of course, it is. Rather, the issue is the proper standard to be applied by the courts of appeals in conducting that review. In short, *amici* urge that, while a finding of discrimination may be clearly erroneous, it is not clearly erroneous *because it was supported "only" by a finding of pretext.*[6] In failing

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[6] In making this point, *amici* do not concede that the finding of discrimination was supported by nothing more than the finding of pretext. First, the *en banc* majority's fixation on the finding of pretext as such

to give the finding of pretext its proper weight, the court of appeals overstepped, both under *Hicks* and under Rule 52. Its decision should be reviewed, and reversed.

2. Besides failing to adhere to *Hicks*, the decision below also deepens a conflict among the circuit courts on the interpretation of that case. This Court should grant the petition to resolve the conflict and provide needed guidance to the lower federal courts. The issues should be taken up in *this* case because it involves two elements -- collective decision-making, and a record presenting proof of gender-based stereotypes – that illustrate with particular potency the importance of maintaining the *McDonnell Douglas* framework to permit plaintiffs to prove discrimination through inferences drawn from indirect evidence.

a. The circuit courts of appeals are deeply divided on the role pretext plays in employment discrimination cases. The majority have held that, under *Hicks*, evidence sufficient

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led it to ignore the evidence underlying that finding as probative of discrimination. Plaintiffs often seek to demonstrate pretext by showing that similarly situated employees outside the protected group were treated differently; petitioner utilized such evidence here. *E.g.*, Pet.App 112a-113a (findings of differential standard used in judging teaching evaluations of male tenure candidates). Such comparative evidence is probative of pretext, but it is also independently probative on the ultimate issue of discrimination. Second, as argued in the petition, the court of appeals failed to consider substantial evidence of gender-based stereotypes employed by respondent's decision-makers, Pet. 21-24, evidence that amply supported the trial judge's decision to infer discriminatory intent. Our point is that even if pretext had been the sole support for the finding of discrimination, that was not a basis for declaring that finding clearly erroneous.

to create a genuine issue of fact as to pretext also creates a triable issue on the ultimate issue of discrimination, precluding summary judgment for the employer. *See Aka v. Washington Hosp. Ctr.*, 116 F.3d 876, 885 (D.C.Cir. 1997) ("[B]ecause evidence sufficient to . . . discredit the defendant's proffered nondiscriminatory reason is evidence sufficient to permit the factfinder to find intentional discrimination . . . summary judgment for the defendant must not be granted when such evidence has been presented."); *Sheridan*, 100 F.3d at 1067; *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1227 (6th Cir. 1996); *Collier v. Budd Co.*, 66 F.3d 886, 892 (7th Cir. 1995); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373, 1381 (10th Cir. 1994); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997). These cases recognize the point missed by the court of appeals here: an employer's proffer of a false reason for its actions provides a sufficient basis for a verdict of discrimination.

Including this case, four courts of appeals have departed from the central teaching of *Hicks* by holding that a finding of pretext may not be sufficient to support a finding of discrimination. *See Woods*, 30 F.3d at 257; *Rhodes*, 75 F.3d at 994; *Kehoe v. Anheuser-Busch, Inc.* 96 F.3d 1095, 1102 (8th Cir. 1996). Like the decision below, these cases discuss hypothetical, exceptional circumstances as a justification for a wholesale rejection of the proper place assigned to pretext by *Hicks*. For example, *Woods* described one such exceptional circumstance to hold that summary judgment is not *always* improper where the plaintiff has demonstrated a

genuine issue of fact as to pretext. *See Woods*, 30 F.3d at 261 n.3. Subsequently, the First Circuit has applied what might have been a narrow and largely hypothetical[7] exception to *Hicks* as if the need to show more than pretext is the general rule. *See Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 38-42 (1st Cir.) (affirming summary judgment without consideration of whether plaintiff offered sufficient evidence to permit finding that employer's proffered explanation was pretextual, or why pretext would not be sufficient), *cert. denied*, 116 S. Ct. 914 (1996). In light of the widening gap between the courts of appeals regarding the relationship between findings of pretext and of discrimination, the moment has arrived for this Court to resolve the conflict.[8]

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[7] *See Aka*, 116 F.3d at 884 (the "hypothetical" situation posited in *Woods* "seems extraordinarily unlikely," because it would require evidence to be placed into the record supporting a position advanced by none of the parties).

[8] The pressing need for resolution of this conflict, and for guidance on the place of pretext in proving discrimination, is demonstrated by the confused state of the law in the Eighth Circuit. In first considering the meaning of *Hicks* in 1994, that court held that if "there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons . . ., then the evidence is sufficient to allow the jury to determine whether intentional discrimination occurred, and we are without power to reverse a jury's finding." *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1109 (8th Cir.), *cert. denied*, 115 S. Ct. 355 (1994). This was a correct statement of the teaching of *Hicks*.

Only months later, however, another panel of the same court

b. Finally, the fact that this case involves a challenge to a decision to deny tenure, and the presence of gender-based stereotypes, make it particularly important to grant the petition. Tenure denials are collective decisions -- attributable to a departmental committee, for example, or the various recommendations of numerous officials -- made after several stages of review. As a result, many disparate motives may be in play, and various actors may have quite different reasons for their positions. In such circumstances, careful application of the framework for litigating discrimination cases is most important, because the need to limit the scope of the litigation by framing the factual issues -- core purposes of *McDonnell Douglas* -- is at its height. *See Burdine*, 450 U.S. at 255-56 (purpose of compelling employer to articulate

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endeavored in *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994), to limit *Gaworski* (and by extension *Hicks*) to cases in which evidence of pretext serves "double duty" -- that is, that it "serve[s] the additional purpose of permitting an inference that . . . discrimination was a motivating factor in a plaintiff's termination." Unfortunately, the decision in *Nelson*, like the decision below, provided no guidance to distinguish those cases where pretext serves this "double duty" from those where it does not. More fundamentally, the purported distinction fails to recognize that *Furnco* and *Hicks* established that evidence of pretext *by its nature* serves such "double duty" and permits an inference of discrimination. In spite of this, the Eighth Circuit later characterized the cases in which it does so as "presumably rare," and indicated that plaintiffs routinely must introduce "independent proof of intentional discrimination" to buttress the probative force of the evidence of pretext. *See Kehoe*, 96 F.3d at 1102. The Eighth Circuit's confusion is symptomatic of the courts of appeals in general, making manifest the need for guidance from this Court.

its explanation is "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext").

That, in part, is what the *prima facie* case is designed to do -- compel the employer (which is, after all, in the best position to know why it acted) to come forward with an explanation, thus defining and limiting the scope of the litigation. The court of appeals' decision makes it impossible for the plaintiff to avoid having the case be about the motives of every individual who influenced the decision, because the trier of fact may seize on any of those motives as the elusive "third reason." Worse, even if the trier of fact sifts through those many motives and concludes at the end of the day that discriminatory animus explained the decision, the appellate court -- noting the "possibility" of other motives -- can overturn the verdict under Rule 52. It is difficult to envision how such litigation could be managed. And even if it could be, it would afford only the rare plaintiff with direct evidence of the employer's discriminatory intent a full and fair opportunity to prove her case.

These difficulties of proof are still more pressing where the plaintiff relies, as here, on evidence that gender stereotypes influenced some or all of the individuals involved in the decision. Pet.App. 305a-307a (Newman, Ch.J., dissenting). The importance of proper application of the *McDonnell Douglas* framework is greatest when the use of stereotypes forms part of the basis for the plaintiff's claim (and here, the fact-finder's conclusion) that discrimination was the real reason for an employment decision. Stereotypes -- like the notion that women who have interrupted their careers for

family reasons are either less serious about their careers or less able than men (or other women) without such responsibilities -- may be subtle. The ways in which they affect decision-makers' perceptions can be even more so. Disregarding them as evidence of discriminatory animus, and hence as proof supporting the conclusion that an employer's pretextual explanation was a pretext *for discrimination*, undermines this Court's decision in *Price Waterhouse* that an employer's use of gender-based stereotypes violates Title VII. The court of appeals' failure to address the evidence of stereotyping as proof of discrimination will have exactly this consequence, further warranting this Court's review.

CONCLUSION

The petition for a writ of *certiorari* should be granted.[9]

Respectfully submitted.

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[9] It is noteworthy that the Equal Employment Opportunity Commission participated in the case below as *amicus curiae* in support of the petitioner. Pet.App. 187a. In light of the fact that the court of appeals has taken a position which conflicts with that of the agency charged with interpretation, administration, and enforcement of Title VII, *amici* respectfully suggest that this would be an appropriate occasion for the Court to request that the Solicitor General provide the views of the United States on whether *certiorari* should be granted.